

## The Supreme Court of Canada (By a Slim Majority) Confirms the Presumption of Deference in Alberta

By: Shaun Fluker

**Case Commented On:** *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, [2016 SCC 47](#)

In 2015 the Alberta Court of Appeal issued two decisions which suggested the Court is attempting to curtail the presumption of deference in the judicial review (or statutory appeal) of statutory tribunal decisions in this province: see *Edmonton (East) Capilano Shopping Centres Ltd v Edmonton (City)*, [2015 ABCA 85 \(CanLII\)](#) (*Capilano*, ABCA) which I commented on in [Where Are We Going on Standard of Review in Alberta?](#) and *Stewart v Elk Valley Coal Corporation*, [2015 ABCA 225 \(CanLII\)](#) which I commented on in [Fundamental Legal Questions and Standard of Review in Alberta](#). The Supreme Court of Canada granted leave to appeal on both decisions, and on November 4 the Supreme Court issued its decision in *Capilano: Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, [2016 SCC 47 \(Capilano\)](#). The slim majority judgment (5-4) written by Justice Andromache Karakatsanis reverses the Court of Appeal on both its standard of review analysis and on the merits of the case by restoring the assessment review board decision. The result for standard of review analysis is that the presumption of deference to substantive decisions made by statutory tribunals should be alive and well in Alberta, but it should be noted there is a growing resistance to the presumption not only at the Alberta Court of Appeal but also within the Supreme Court of Canada.

In [Some Thoughts on the Presumption of Deference](#) I gave a brief overview of the fundamentals at issue in judicial review, and I won't reiterate those at length here. Simply put, a reviewing court must arrive at its conclusion on whether to set aside a tribunal decision taking into account the rule of law which demands a measure of rigor and accountability by administrative tribunals to legal principles, but the court must also respect the intention of the legislature to empower a statutory tribunal to make legal determinations for the area in question. The standard of review chosen by the court speaks largely to which of these considerations it favours in a given case: correctness suggests more concern with the rule of law and reasonableness suggests a court deferential to legislative intent. This is proving to be a difficult exercise, and there is a fissure developing across the current members of the Supreme Court. This is evident both here in *Capilano* and in *Wilson v Atomic Energy of Canada*, [2016 SCC 29 \(CanLII\)](#) released in July of this year. Concern for the rule of law is leading some Supreme Court Justices to push back against the presumption of deference and return to more of a 'functional and pragmatic' approach to standard of review.

The administrative law issue in *Capilano* concerns the Edmonton assessment review board, a statutory tribunal empowered by Part 11 of the *Municipal Government Act*, [RSA 2000, c M-26](#) to hear complaints from city taxpayers on their property assessments, typically arguing the assessed value is too high and should be reduced by the Board. Municipalities in Alberta assess property values every calendar year, and the assessed value for a property determines the amount of

property tax payable by the owner to the municipality in a calendar year. In this case the Board had decided it had the authority under the *Municipal Government Act* to not only dismiss a complaint seeking a reduction in assessed value but also to increase the assessed value of the complainant's property as requested by the City during the hearing. In the initial judicial review hearing Justice Rooke concluded the applicable standard to review the Board's decision was correctness on the basis that the Board's determination that it could increase assessed property value was a true question of jurisdiction – one of the established exceptions to the presumption of deference owed by a reviewing court to a statutory tribunal interpreting its home legislation (see *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, [2013 ABQB 526 \(CanLII\)](#) at paras 18-31). The Court of Appeal likewise ruled the applicable standard of review was correctness, but did so on very different grounds, which was the subject of my post in [Where Are We Going on Standard of Review in Alberta?](#).

The majority of the Supreme Court in *Capilano* rules the standard of review for the Board's decision is reasonableness and that it was reasonable for the Board to increase the assessed value of complainant's property during the hearing (at para 3). My analysis in this post is organized under the following themes: (1) the presumption of deference; (2) the statutory right of appeal; (3) relative expertise; and (4) the contextual or factored standard of review analysis.

### **The Presumption of Deference**

The notion of employing a presumption of deference to simplify standard of review analysis was suggested by Justice Binnie in his concurring opinion in *Dunsmuir v New Brunswick*, [2008 SCC 9 \(CanLII\)](#) (at para 146), however the majority of the Supreme Court in *Dunsmuir* did not concur with him. The presumption gained additional traction in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011 SCC 61 \(CanLII\)](#), where Justice Rothstein wrote that the principle of judicial deference asserted in *Dunsmuir* had evolved to the point where there is a presumption the standard of review is the deferential reasonableness where a statutory tribunal applies and interprets its home statute (*Alberta Teachers' Association* at para 39). Then in *McLean v British Columbia (Securities Commission)*, [2013 SCC 67 \(CanLII\)](#), Justice Moldaver reinforced the presumption of deference by asserting the onus lies on an applicant in judicial review to establish the statutory interpretation given by a decision-maker to its home statute is unreasonable (*McLean* at paras 40, 41).

The majority in *Capilano* once again articulates the jurisprudential strength of this presumption:

Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v Saguenay (City)*, [2015 SCC 16](#), [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

The *Dunsmuir* framework provides a clear answer in this case. The substantive issue here — whether the Board had the power to increase the assessment — turns on the

interpretation of s. 467(1) of the *MGA*, the Board's home statute. The standard of review is presumed to be reasonableness. (at paras 22, 23)

The dissenting opinion in *Capilano* written by Justices Côté and Brown departs from the majority by holding that the presumption of deference is rebutted in this case. Interestingly Justice Moldaver who wrote about a very strong presumption of deference in *McLean* joins the dissent here in *Capilano* as does Chief Justice McLachlin who seems to have abandoned her support for the *Dunsmuir* approach. The dissent finds the statutory scheme of the *Municipal Government Act* and the Board's lack of relative expertise in statutory interpretation rebuts the presumption of deference in this case.

### **The Statutory Right of Appeal**

The Alberta Court of Appeal gave us a surprising new exception to the presumption of deference owed to statutory tribunals by ruling in *Capilano*, ABCA that the statutory right of appeal set out in section 470 of the *Municipal Government Act* demonstrates a legislative intent for an intrusive judicial role into municipal property tax assessment and therefore is an indication that the standard of review should be correctness (see [Where Are We Going on Standard of Review in Alberta?](#) for more on this). The Supreme Court is unanimous in rejecting this line of reasoning. Justice Karakatsanis for the majority expressly disagrees, writing that the Court of Appeal goes against 'strong jurisprudence' from the Supreme Court on this point (at paras 27 – 31). Justices Côté and Brown for the dissent agree with the majority on this point that the presence of a statutory right of appeal does not establish a new category for correctness review (at para 70), however they do give the statutory right of appeal some work to do in a contextual analysis that leads to correctness – more on that in a minute.

### **Relative Expertise**

I noted in [Some Thoughts on the Presumption of Deference](#) that the presumption of deference risks overlooking the context or subtle wrinkles that arise in the exercise of statutory power. I also observed the concerns set out by a string of concurring opinions in the Supreme Court of Canada which caution against a blanket presumption of deference towards statutory interpretation by administrative tribunals of their home legislation and assert the need for deference to rest on a more principled foundation like demonstrated expertise or familiarity of the tribunal with that legislation. For example, Madam Justice Deschamps wrote a concurring opinion in *Alberta Teachers' Association* on the view that judicial deference is based upon the principle of relative expertise or experience in a particular area, and thus a bare assertion of a presumption of deference simply because a statutory decision-maker is interpreting its home statute pays too little attention to whether the statutory decision-maker actually has sufficient expertise or experience to justify deference to its determination of a legal question (*Alberta Teachers' Association* at paras 82 – 89). The issue in part is how much probing into the expertise of a statutory tribunal will a reviewing court undertake to establish relative expertise?

A fissure is developing at the Supreme Court over standard of review, and I suggest it is forming around this notion of relative expertise. Justice Karakatsanis for the majority here in *Capilano* simply looks to the governing statute and institutional specialization to establish relative expertise in the Board with respect to interpreting provisions of the *Municipal Government Act*:

The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the

expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: “. . . in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Dunsmuir*, at para. 49, quoting D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Canada (Citizenship and Immigration) v. Khosa*, [2009 SCC 12](#), [2009] 1 S.C.R. 339, at para. 25). Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: “. . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions” (*Dunsmuir*, at para. 68). As this Court has often remarked, courts “may not be as well qualified as a given agency to provide interpretations of that agency’s constitutive statute that make sense given the broad policy context within which that agency must work” (*McLean*, at para. 31, quoting *National Corn Growers Assn. v. Canada (Import Tribunal)*, [\[1990\] 2 S.C.R. 1324](#), at p. 1336, per Wilson J.). (at para 34)

Justices Côté and Brown accuse the majority of ignoring the expertise factor in this case. They warn that grounding tribunal expertise merely in its institutional setting risks making the presumption of deference irrefutable: “Courts must not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law.” (at para 85) They probe expertise to a greater depth here, and find – like the Alberta Court of Appeal did - that the Board does not have relative expertise in statutory interpretation.

### **The Contextual or Factored Standard of Review Analysis**

Readers with history in Canadian administrative law that stretches further back than the 2008 *Dunsmuir* decision will sense there is something innately familiar with the dissent’s reasoning here in *Capilano*. Indeed, the dissenting opinion reads very much like the old ‘pragmatic and functional approach’ to standard of review analysis – you know – the approach that *Dunsmuir* was supposed to sweep out the back door because it was too mechanical and repetitive. Early in their dissent, Justices Côté and Brown write that “[i]n every case, a court must determine what the appropriate standard of review is for *this* question decided by *this* decision maker.” (at para 71, emphasis in original). They are careful to distance themselves from a full return to the pragmatic and functional approach by stating that a full contextual standard of review analysis need not be conducted in every single case, however there isn’t much context left unturned in their analysis here regarding *this* question and *this* decision maker, and for the most part Justices Côté and Brown only pay lip service to the *Dunsmuir* approach. Their dissenting opinions in *Capilano* and in *Atomic Energy* are both directed at dismantling the presumption of deference articulated by the Court since *Dunsmuir*. Expect more of the same when the Supreme Court issues its decision in *Elk Valley*.

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